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In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., RESPONDENTS

On Writ of Certiorari to
The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF RESPONDENTS MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 109 of the Clean Air Act, 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

2. Whether the court of appeals exceeded its jurisdiction by reviewing, as a final agency action that is ripe for review, EPA's preliminary preamble statements on the scope of the agency's authority to implement the revised "eight-hour" ozone NAAQS.

3. Whether provisions of the Clean Air Act Amendments of 1990 specifically aimed at achieving the long-delayed attainment of the then-existing ozone NAAQS restrict EPA's general authority under other provisions of the CAA to implement a new and more protective ozone NAAQS until the prior standard is attained.

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BRIEF FOR RESPONDENTS MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONERS

STATEMENT

A. Statutory and Regulatory Background

The National Ambient Air Quality Standards (NAAQS) form the centerpiece of what many consider to be this country's single most important environmental program. These standards protect public health by governing the quality of the outdoor air throughout the nation. They address the pollutants–sulfur oxides, nitrogen oxides, lead, carbon monoxide, ozone, and particulate matter–that are among the best-studied, most pervasive, and most diversely harmful of the byproducts of industrial society. A large part of the federal regulation that takes place under the Clean Air Act, and most of the state regulation, have as their objective the attainment of air quality consistent with the NAAQS. This case, which involves the NAAQS for particulate matter and ozone, places in issue the processes for both establishing and implementing the NAAQS.

1. Congress has devised an intricate and highly constrained process for the establishment and revision of the NAAQS by the Environmental Protection Agency (EPA). This process prescribes the factors EPA is to consider in setting the NAAQS; requires a margin of safety to address the problem of scientific uncertainty; targets only ubiquitous, harmful air pollutants; mandates exhaustive scientific inquiry into the consequences of these pollutants for human health and welfare; requires EPA to consult with a scientific committee formed to advise the agency on the consequences of and alternative regulatory responses to air pollution; requires extensive opportunity for public review and comment; and provides for judicial review.

2. The process for implementing the NAAQS is equally elaborate. Although the states have the primary responsibility

to devise and implement the programs to achieve the NAAQS, the Clean Air Act significantly constrains the timing and content of the process of implementation. For areas that had not met the NAAQS that existed when the Act was amended in 1990, the Act dictated highly specific deadlines and control measures. Most of these deadlines have now passed.

3. In its essence, this case questions whether Congress has forsaken its legislative duties in assigning authority to an executive agency. In this setting, it is important to understand Congress's working relationship with the regulatory program under scrutiny. Today's NAAQS program is the combined result of numerous separate Acts of Congress passed over a period of decades. Each time Congress has revised the statutory provisions at issue here, it has done so in direct response to some agency action (or inaction), sometimes ratifying and sometimes adjusting the agency's course. In many instances, Congress has fine-tuned the statutory requirements in light of the executive's experiences in attempting to address air pollution in the face of persistent scientific uncertainty. Review of the historical development of the NAAQS program thus reveals an exceedingly close and fruitful working relationship between Congress and the executive in shaping and refining national policy with respect to air pollution.

1. Establishing and Revising the NAAQS

The Clean Air Act requires the Administrator of EPA to establish and periodically revise NAAQS for a limited subset of air pollutants. Clean Air Act (CAA) §§ 108-109, 42 U.S.C. §§ 7408-7409. These standards identify the maximum permitted level of the regulated pollutants in the outside air.[1]

[1]Primary NAAQS protect the public health. CAA § 109(b)(1), 42 U.S.C. §7409(b)(1). Secondary standards protect public welfare, 42 U.S.C. §7409(b)(2), broadly defined to include, for example, effects on soils, crops, and wildlife. CAA § 302(h), 42 U.S.C. § 7602(h). The primary and secondary standards at issue here are identical. *See* NAAQS for Particulate Matter, 62 Fed. Reg. 38,652, 38,653 (1997); NAAQS for Ozone, 62 Fed. Reg. 38,856 (1997).

NAAQS may be set only for air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." CAA § 108(a)(1)(A)-(B), 42 U.S.C. § 7408(a)(1)(A)-(B). Today, NAAQS exist for six pollutants: particulate matter (PM), sulfur dioxide, carbon monoxide, nitrogen dioxide, ozone, and lead. 40 C.F.R. §§ 50.4 - 50.12.

The Clean Air Act requires extensive scientific inquiry into the nature and severity of harm caused by an air pollutant before a NAAQS can be set. The Act requires, first, that air quality "criteria" be developed for pollutants in the NAAQS program. (Hence the term "criteria pollutants.") The air quality criteria–which are described in a "criteria document" prepared by the agency–must reflect "the latest scientific knowledge" indicating the "kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." CAA § 108(a)(2), 42 U.S.C. §7408(a)(2).

The Act requires, in addition, that a scientific advisory committee–the Clean Air Scientific Advisory Committee (CASAC)–review the air quality criteria and NAAQS. CASAC must recommend to the Administrator any new or revised NAAQS that may be appropriate in light of the statutory requirements and describe the areas in which "additional knowledge" is required to evaluate any NAAQS. CAA §109(d)(2)(B)-(C), 42 U.S.C. § 7409(d)(2)(B)-(C). In setting the NAAQS, the Administrator may significantly depart from CASAC's recommendations only if she explains why she has done so. CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3).

The NAAQS themselves must be "based on" the air quality criteria. CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). The NAAQS are standards the attainment and maintenance of which, "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1).

The Clean Air Act directs the Administrator to review the NAAQS every five years. CAA § 109(d)(1), 42 U.S.C. §7409(d)(1). Based on this review, the Administrator may promulgate a new NAAQS, or revise an existing one. 42 U.S.C. § 7409(a)(1). No new pollutant has been regulated under the NAAQS program since 1978, when the NAAQS for lead was issued.[2] Pursuant to its obligation of periodic review, however, EPA has undertaken multiple reviews and revisions of the criteria and NAAQS for the six criteria pollutants.[3]

In setting any NAAQS, EPA must specify at least three different regulatory parameters.[4] First, EPA must specify the concentration *level* for a pollutant (e.g., *X* parts per million). Second, EPA must specify an *averaging time* for concentrations of the pollutant (e.g., one hour, 24 hours, one year, etc.). Finally, the agency must specify a "*form*," which is the air quality statistic used to determine compliance with the standard (e.g., no more than one exceedance per year). The form of a NAAQS is at once an integral part of the standard itself and an essential step towards enforcement.

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[2] NAAQS for Lead, 43 Fed. Reg. 46,246 (1978).

[3] *See* 62 Fed. Reg. 38,856 (1997) (revising ozone NAAQS); 62 Fed. Reg. 38,366 (1997) (revising particulate matter NAAQS); 61 Fed. Reg. 52,852 (1996) (reviewing nitrogen dioxide NAAQS); 61 Fed. Reg. 25566 (1996) (reviewing sulfur oxides NAAQS); 59 Fed. Reg. 38,906 (1994) (reviewing carbon monoxide standard); 58 Fed. Reg. 21,351 (1993) (reviewing sulfur oxides NAAQS); 52 Fed. Reg. 24,634 (1987) (revising PM NAAQS); 50 Fed. Reg 37,484 (1985) (reviewing carbon monoxide NAAQS); 50 Fed. Reg. 25,532 (1985) (reviewing nitrogen dioxide NAAQS); 44 Fed. Reg. 8202 (1979) (revising photochemical oxidants NAAQS); 43 Fed. Reg. 46,246 (1978) (promulgating new NAAQS for lead).

[4] *See, e.g.*, NAAQS for PM, 62 Fed. Reg. at 38,666-68.

2. Implementing the NAAQS

The NAAQS themselves do not place limits on any source of pollution. Thus, once the NAAQS are set, attention shifts to achieving them. Although the Clean Air Act gives the states the primary responsibility to implement the programs to achieve the NAAQS, *see* CAA § 110, 42 U.S.C. § 7410, the statute also significantly constrains the timing and content of the process of implementation.

Designation; Attainment Status. Implementation begins with the designation of areas according to whether their air quality complies with the NAAQS. The three possible designations are "attainment" (area meets the NAAQS), "nonattainment" (area does not meet the NAAQS), or "unclassifiable" (area's attainment status cannot be determined based on available information). CAA §107(d)(1)(A)(i)-(iii), 42 U.S.C. §7407(d)(1)(A)(i)-(iii). An area may be "attainment" for some pollutants and "nonattainment" for others.

Section 107(d) provides that areas may be or have been designated in three different circumstances. First, areas may be designated when a new NAAQS is established or an existing one is revised. CAA § 107(d)(1); 42 U.S.C. § 7407(d)(1). Second, areas were designated following the 1990 Amendments to the Clean Air Act. CAA § 107(d)(4); 42 U.S.C. § 7407(d)(4). Third, areas may be "redesignated" based on new information, CAA § 107(d)(3); 42 U.S.C. § 7407(d)(3); for example, an attainment area may be redesignated as nonattainment if its air quality ceases to meet the NAAQS.

State Implementation Plans. The next step is for the states to submit state implementation plans, or "SIPs." CAA § 110, 42 U.S.C. § 7410. These plans specify the measures states will take to attain or maintain the NAAQS within their borders. 42 U.S.C. § 7410(a)(1). A state may consider cost and technological feasibility in developing its SIP; indeed, "[s]o long as the national standards are met, the State may select whatever mix of control devices it desires . . ." *Union Electric*

Company v. EPA, 427 U.S. 246, 266 (1976); *see also Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

Nonattainment. Special rules apply to nonattainment areas. Part D of Subtitle I of the Act sets forth requirements for SIPs in states containing nonattainment areas. CAA §§ 171-193, 42 U.S.C. §§ 7501-7515. Part D contains five subparts. Subpart 1 sets forth rules for nonattainment areas in general. CAA §§171-179B, 42 U.S.C. §§ 7501-7509a. Subparts 2-5, added to the Act in 1990, impose new requirements on areas that had not attained the various NAAQS existing at that time. CAA § 181-192, 42 U.S.C. §§ 7511-7514a.

Subpart 1. Under Subpart 1, the Administrator may "classify" nonattainment areas in accordance with the severity of their air quality problems, for the purpose of setting attainment deadlines. CAA § 172(a)(1)(A), 42 U.S.C. §7502(a)(1)(A). Subpart 1 requires that SIPs in nonattainment areas achieve "reasonable further progress" toward attaining the NAAQS. Subpart 1 also requires that primary NAAQS be achieved "as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment . . . ." CAA § 172(a)(2)(A); 42 U.S.C. § 7502(a)(2)(A).

Subpart 2. Subpart 2 imposed new, more specific requirements on areas that had not attained the ozone standard existing in 1990, when Subpart 2 was enacted.[5] Like Subpart 1, Subpart 2 establishes both what is required in these nonattainment areas and when it is required. Specific requirements and deadlines depend on an area's classification, and the classification depends on the severity of an area's air pollution problem. The classifications prescribed by Subpart 2 are keyed to the ozone standard existing in 1990, as is the methodology to be employed in making these classifications. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). Most of the deadlines

[5]Subparts 3-5 imposed new requirements on areas that did not meet the existing standards for carbon monoxide, particulate matter, nitrogen dioxide, and/or lead. CAA §§ 186-193, 42 U.S.C. §§ 7512-7515.

contained in Subpart 2 have already passed. *See, e.g.*, CAA § 181(a)(1); 42 U.S.C. § 7511(a)(1) (table 1).

3. History of the Clean Air Act and the NAAQS Program

This regulatory regime did not emerge overnight. In fact, the Clean Air Act today embodies no fewer than eleven separate Acts of Congress, stretching back almost 50 years.[6] These five decades of federal air pollution law have witnessed an extraordinary collaboration between Congress and the agencies that have been charged with implementing Congress's commands. In the historical development of the Clean Air Act, one can observe a decades-long dialogue between Congress and the executive about the scope and content of federal air pollution policy. This collaboration and dialogue has led to numerous extremely precise and significant refinements in the statutory language relating to air quality criteria and standards, refinements that reflect the congressional response to the executive's experiences in grappling with the problem of air pollution.

Congress's effort to address the problem of air pollution began in 1955. The first federal law on air pollution authorized the Surgeon General to conduct studies on the consequences and prevention of air pollution and provided funding for this research.[7] Reflecting Congress's conviction at the time that air pollution was a matter for states and local governments to address, a primary purpose of the research was to help these entities attack air pollution problems on their own.[8] To this day, a primary aim of the Clean Air Act is to promote research into the causes and consequences of air pollution; indeed, vestiges of the 1955 statute can be found in

[6]*See* 1 William H. Rodgers, *Environmental Law* 124 (2d ed. 1994).

[7]*See* Air Pollution Control Act of 1955, Pub. L. 84-159, 69 Stat. 322.

[8]*See id.*

today's Clean Air Act.[9]

The early federal legislation reflected the growing awareness that air pollution posed a severe threat to the population's health and welfare. Severe air pollution episodes in Donora, Pennsylvania, in 1948, in London in 1952, and in New York City in 1953 had together caused the deaths of thousands of people.[10] A study of the Donora episode performed by the United States Public Health Service provided the first definitive evidence of the acute health effects of air pollution.[11] Studies performed in the 1950s also began to establish a causal link between automotive exhausts and smog.[12] In 1960, Congress responded to these early findings by passing the Schenck Act, calling for further research into the consequences for health and welfare of motor vehicle exhaust.[13] Thus the early years of federal air pollution legislation witnessed a consistent pattern: preliminary research showed a threat from air pollution; this research was followed by critiques and counter-research; and the eventual result was typically research confirming the existence of a threat. This pattern – the pattern, in fact, of scientific inquiry – is a recurring, indeed defining, feature of air pollution control.

The 1960s witnessed the federal government's steadily increasing involvement in addressing air pollution. In 1963,

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[9]*Compare, e.g.*, § 3, 69 Stat. 322, *with* CAA § 103(a)(3), 42 U.S.C. § 7403(a)(3) (authorizing Surgeon General and EPA, respectively, to conduct research and make recommendations at the request of state and local agencies).

[10]*See* Staff of Senate Comm. on Public Works, 88th Cong., 1st Sess., *A Study of Pollution – Air* 13 (Comm. Print 1963).

[11]*See* H.H. Schrenk, U.S. Public Health Service, Air Pollution in Donora, Pa. (1949).

[12]*See Air Pollution Problems: Hearings Before the House Select Comm. on Small Business*, 84th Cong., 2d Sess. 42 (1956) (statement of Arie J. Haagen-Smit, Cal. Inst. of Tech.).

[13]*See* Act of June 8, 1960, Pub. L. No. 86-493, 74 Stat. 162 (1960).

Congress enacted the original Clean Air Act.[14] This statute for the first time authorized the federal government–acting through the Secretary of the Department of Health, Education, and Welfare (HEW)–to establish "criteria" for air quality. 77 Stat. 392 § 3(c)(2). The language describing the scope and content of the original air quality criteria was strikingly similar to the corresponding language of the Clean Air Act today.[15]

The Clean Air Act of 1963 also directed the Secretary to gather and publish information on air pollution control techniques.[16] The criteria and the information on control techniques were to be made available to state, local, and interstate air pollution control agencies,[17] and the Secretary was directed to help these agencies develop their own standards to control air pollution.[18] Somewhat confusingly, Congress used the same term, "criteria," for both the scientific *information* on the consequences of air pollution and *standards* for air quality.[19] But the basic goal of the standards was clear enough and has persisted to this day: the Secretary was to recommend to local, state, or interstate air pollution control agencies those standards which "in [the Secretary's] judgment

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[14]*See* Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392.

[15]The statute provided:

> Whenever [the Secretary] determines that there is a particular air pollution agent (or combination of agents), present in the air in certain quantities, producing effects harmful to the health or welfare of persons, the Secretary shall compile and publish criteria reflecting accurately the latest scientific knowledge useful in indicating the kind and extent of such effects which may be expected from the presence of such air pollutant agent (or combination of agents) in the air in varying quantities.

§ (3)(c)(2), 77 Stat. 392; *cf.* CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2).

[16]*See* §§ 3(a)(1), 3(b)(8), 77 Stat. at 394-95.

[17]*See* § 3(c)(2), 77 Stat. at 395.

[18]*See* §§ 2(a), 3(a)(2), 3(b), 77 Stat. at 393-95.

[19]*See* § 3(c)(3), 77 Stat. at 395.

may be necessary to protect the public health and welfare."[20]

The Clean Air Act of 1963 thus introduced some of the broad outlines of federal air pollution policy as it exists today. However, the statute did not set deadlines for HEW's establishment of air quality criteria; it encouraged but did not require the establishment of air quality standards by states and local governments; and it provided new but cumbersome and limited mechanisms for the control of interstate air pollution.[21] Thus, it is not surprising that little happened under the Clean Air Act of 1963: HEW published air quality criteria for only one set of air pollutants, sulfur oxides,[22] and the enforcement mechanisms created by the Act proved inadequate.[23]

In 1967, Congress acted again.[24] In the Air Quality Act of 1967, Congress directed the Secretary of HEW to establish air quality criteria that were to reflect "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities."[25] In developing the criteria, the Secretary was directed to consult with "appropriate advisory committees and

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[20] § 3(c)(3), 77 Stat. at 395.

[21] §§ 3(c)(2)-(3), 5, 77 Stat. at 395-99.

[22] *See* Public Health Service, HEW, Pub. No. 1619, Air Quality Criteria for Sulfur Oxides (1967) [hereinafter 1967 SOx Criteria Doc.].

[23] *See* Rodgers, *supra*, at 130.

[24] Congress also had, two years before, passed amendments to the Clean Air Act which, for the first time, directed the Secretary to set emissions standards for motor vehicles. *See* Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272, § 202, 79 Stat. 992.

[25] Air Quality Act of 1967, Pub. L. No. 90-148, § 107(b)(2), 81 Stat. 491. The 1967 Act also continued to require the Secretary to develop and disseminate information on control techniques. For the first time, Congress required that this information include information on technological and economic feasibility. *See* § 107(c), 81 Stat. at 491.

Federal departments and agencies."[26] In light of this new requirement, the Secretary was told to reevaluate the only criteria document he had issued so far (on sulfur oxides).[27]

The 1967 Act also introduced part of the language that now governs the NAAQS themselves: the Act directed the Secretary to issue "such criteria of air quality as in his judgment may be requisite for the protection of the public health and welfare."[28]

Congress continued to rely largely on the states for the development of air quality *standards* (rules governing air quality) as opposed to *criteria* (the scientific documents on which the standards were to depend). But in the 1967 Act, Congress created an important exception to this rule: if a state did not establish air quality standards for air pollutants for which the Secretary had issued criteria or if a state established standards which were not "consistent with" the Secretary's criteria, the Secretary himself was required to promulgate air quality standards for that state.[29]

Once again, however, the statute did not obligate HEW to act by a certain date, nor did it obligate the states to act at all. And, once again, progress under the statute was disappointing. By late 1969, HEW had issued criteria for only two pollutants;[30] fewer than half of the states had set air quality standards for sulfur oxides;[31] and no state air quality

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[26] § 107(b)(1), 81 Stat. at 491.

[27] *See id.*

[28] *Id.*

[29] §§ 108(c)(1-2), 81 Stat. at 492.

[30] *See* 1967 SOx Criteria Doc.; National Air Pollution Control Administration (NAPCA), HEW, Pub. No. AP-49, Air Quality Criteria for Particulate Matter (1969) [hereinafter 1969 PM Criteria Doc.]; NAPCA, HEW, Pub. No. AP-50, Air Quality Criteria for Sulfur Oxides (1969) [hereinafter 1969 SOx Criteria Doc.].

[31] *See* Secretary of Health, Education, and Welfare, Progress in the Prevention and Control of Air Pollution, S. Doc. No. 91-64, at 16-18 (2d. Sess. 197[illegible] *see*

standard had been approved by HEW.[32] In addition, the enforcement mechanisms of the 1967 Act, aimed at interstate air pollution, lay almost entirely dormant.[33] By the time HEW issued criteria for three more air pollutants in early 1970, Congress was already at work on new legislation.[34]

The Clean Air Amendments of 1970 reflected a fundamental break with the past in several respects. The most obvious change was institutional: for the first time, Congress required the federal government to set standards for air quality even in the absence of a finding of inadequacy with respect to any state standards. The states retained the task of implementing the air quality standards, but EPA–created during Congress's deliberations on the 1970 Amendments[35]–was directed to set the standards.[36]

Also for the first time, Congress limited the category of air pollutants to which the air quality standards would apply. The 1970 Amendments provided that the standards would be set only for pollutants listed by EPA, and that EPA would list a pollutant only if it "has an adverse effect on public health or

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also Air Pollution - 1970: Hearings Before the Subcomm.. on Air and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 2d Sess. (March 17, 1970) (Appendix - Part 1) (hereinafter "March 17 Hearing")

[32]*See* March 17 Hearing, *supra* (Appendix - Part 1).

[33]*See* S. Doc. No. 91-64, at 24-25; *see also* March 17 Hearing, *supra* (Appendix - Part 1).

[34]*See* NAPCA, HEW, Pub. No. AP-62, Air Quality Criteria for Carbon Monoxide (1970) [hereinafter 1970 CO Criteria Doc.]; NAPCA, HEW, Pub. No. AP-63, Air Quality Criteria for Photochemical Oxidants (1970) [hereinafter 1970 Ozone Criteria Doc.]; NAPCA, HEW, Pub. No. AP-64, Air Quality Criteria for Hydrocarbons (1970) [hereinafter 1970 HC Criteria Doc.].

[35]*See* Reorg. Plan No. 3 of 1970, 5 U.S.C.A. App. (Supp. 1992).

[36]*See* Clean Air Amendments of 1970, Pub. L. No. 91-604, sec. 109, § 4(a), 84 Stat. 1679. States are free, however, to set air quality standards that are stricter than the federal standards. CAA § 116, 42 U.S.C. § 7416.

welfare" and comes from "numerous or diverse" sources.[37]

With respect to the air quality *criteria*, Congress required for the first time that the criteria describe effects on "*public* health and welfare." Previously, it had required that criteria describe effects on the health and welfare "of persons"[38] or simply on "health and welfare."[39] Indeed, the original Senate version of the 1970 amendments referred to the "health of persons," but the House version–referring to "public health or welfare"–prevailed.[40] Tellingly, at the same time, Congress endorsed the same shift in emphasis with respect to mobile source emission standards: whereas, in 1965, Congress had called for mobile source emissions standards whenever air pollutants endangered the "health or welfare of any persons," in 1970, Congress required such standards only when the "*public* health or welfare" was at risk.[41] By targeting public health, Congress instructed EPA to target health effects in *populations* rather than in single individuals.[42]

Congress also made two significant adjustments to the substance of the air quality *standards*. Although Congress had

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[37]Sec. 108(a)(1)(A-B), § 4(a), 84 Stat. at 1678.

[38]Clean Air Act of 1963, Pub. L. No. 88-206, § 3(c)(2), 77 Stat. 392, 395.

[39]Air Quality Act of 1967, Pub. L. No. 90-148, sec. 107(b)(1), §2, 81 Stat.491.

[40]*Compare* H.R. 17255, 91st Cong. § 2(a) (1970) (requiring air quality standards to be set for pollutants that "endanger or may endanger the public health or welfare") *with* H.R. 17255, 91st Cong. § 10(a)(3) (1970) (providing that air quality standards are those the attainment and maintenance of which are "necessary to protect the health of persons").

[41]*Compare* Motor Vehicle Air Pollution Control Act of 1965, Pub. L. No. 89-272, sec. 202(a), §6, 79 Stat. 992, *with* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, sec. 202 (a)(1), §6, 84 Stat. 1690.

[42]The Senate Report stated that NAAQS must "protect the health of any group of the population," including sensitive groups for which "reference should be made to a representative sample of persons comprising the sensitive group rather than to a single person in the group." S. Rep. No. 91-1196, at 10 (2d Sess. 1970).

previously directed HEW to encourage states and local governments to set uniform standards,[43] it had never required uniformity. This changed in 1970: Congress required EPA's new air quality standards to be *nationally uniform*.[44]

The 1970 Amendments also stated for the first time that the air quality standards protecting human health–the primary standards[45]–must embody "an adequate margin of safety."[46] The requirement of a margin of safety followed directly from HEW's experience in developing its first criteria documents.

HEW's research regarding the first criteria pollutants had revealed several important features (and limits) of scientific inquiry into the effects of air pollution on human health and welfare. First of all, HEW's review of the scientific literature on the criteria pollutants had revealed a diverse array of harms which occurred at a diverse array of pollution levels.[47] The effects on human health alone, HEW had discovered, varied widely, including such disparate effects as the initiation and/or aggravation of respiratory diseases including bronchitis[48] and asthma,[49] impairment of the oxygen-carrying

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[43]*See* Clean Air Act of 1963, Pub. L. No. 88-206, § 2(a), 77 Stat. 393.

[44]*See* Clean Air Amendments of 1970, Pub. L. No. 91-604, sec. 109(a)(1), § 4(a), 84 Stat. 1679 (directing Administrator to publish "a" primary NAAQS and "a" secondary NAAQS for each criteria pollutant).

[45]The creation of two categories of standards – primary and secondary – was another innovation of the 1970 Amendments. *See* sec. 109, § 4(a), 84 Stat. at 1679-80.

[46]Sec. 109(b)(1), § 4(a), 84 Stat. at 1679.

[47]*See* 1967 SOx Criteria Doc. liii (graphic depiction of results of studies concerning health and welfare effects sulfur oxides); 1969 PM Criteria Doc., *supra*, at 188-89 (summary of health effects at various exposure levels); 1970 CO Criteria Doc., *supra*, at 10-7 (table reflecting health effects at various exposure levels); 1970 Ozone Criteria Doc., *supra*, at 10-9 to 10-13 (text and table detailing health and welfare effects associated with different levels of exposure).

[48]EPA, Air Quality Criteria for Nitrogen Oxides 11-8 (1971) [hereinafter 1971 NOx Criteria Doc.].

capacity of the blood,[50] and premature death.[51]

Second, HEW's research had revealed no bright line pollutant level above which adverse effects on human health and welfare were certain to occur and below which such effects did not occur. Identifying a bright line above which adverse effects would certainly occur proved difficult because much of the research on air pollution studied the effects of pollutants in combination rather than in isolation; thus, in developing the criteria for sulfur oxides, for example, HEW acknowledged the possibility that the health effects it found were due to the combination of sulfur oxides and other pollutants rather than to sulfur oxides alone.[52] Inconsistencies among scientific studies,[53] and shortcomings in the studies' methodologies,[54] created further difficulties.[55]

At the same time, HEW had little confidence that the lowest levels at which adverse effects had been detected in the scientific literature were in fact the lowest levels at which such effects occurred.[56] Equally important, HEW had discovered

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[49]*See* 1970 Ozone Criteria Doc., *supra*, at 10-7.

[50]*See* 1970 CO Criteria Doc., *supra*, at 10-3.

[51]*See* 1967 SOx Criteria Doc., *supra*, at xxix.

[52]*Id.* at v-vi.

[53]*See* 1970 Ozone Criteria Doc., *supra*, at 10-7 to 10-8.

[54]1969 PM Criteria Doc., *supra*, at 183 (failure to control for smoking habits).

[55]HEW also encountered challenges simply in measuring exposure levels. *See, e.g.*, 1970 Ozone Criteria Doc., *supra*, at 10-1 to 10-2.

[56]In its 1969 guidelines on developing air quality criteria, HEW explained:

> The exposure levels which have thus far been associated with identifiable effects . . . are not necessarily the lowest levels of exposure that will produce such effects. Nor are those effects necessarily the only ones produced by such exposures. Knowledge of the synergistic effects of air pollutants is limited. So is knowledge of possible long-term genetic

that part of the reason why it was difficult or impossible to identify a single "safe" level of pollution was that different people responded differently to air pollution. HEW's research had revealed that certain subpopulations–including the elderly[57] and people with preexisting cardiovascular or respiratory disease[58]–were most susceptible to the adverse effects of air pollution.[59] In the first criteria document on particulate matter, HEW observed that many effects on sensitive subpopulations would not be picked up by epidemiological research because the sample sizes were often too small.[60]

HEW responded to these challenges by endorsing an approach to standard-setting that leaned in favor of more rather than less stringent standards. In every criteria document published after 1967,[61] HEW closed with a

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effects. . . . In short, air quality criteria cannot be interpreted as threshold values; indeed, for many types of air pollutants, there may not be a threshold of risk to health and the environment. In the evaluation of biological effects of environmental contaminants, whether in the community or occupational environment, accumulating evidence has almost invariably shown that adverse effects can and do occur at exposure levels that at one time were considered "safe."

NAPCA, HEW, Guidelines for the Development of Air Quality Standards and Implementation Plans 16 (1969).

[57] *See* 1970 Ozone Criteria Doc., *supra*, at 10-7.

[58] *See* 1967 SOx Criteria Doc., *supra*, at xxviii; 1969 PM Criteria Doc., *supra*, at 188 (aggravation of bronchitis); 1970 Ozone Criteria Doc., *supra*, at 10-7 (aggravation of asthma); 1970 CO Criteria Doc., *supra*, at 10-4

[59] Congress also had reason to believe that children comprised a subpopulation that might be especially sensitive to air pollution. In his floor statement introducing the 1970 Amendments, Senator Muskie referred to a study concerning the health effects of nitrogen dioxide on children. 116 Cong. Rec. 32,913 (1970).

[60] *See* 1969 PM Criteria Doc., *supra*, at 188.

[61] The hydrocarbons criteria document did not offer this recommendation because HEW found that hydrocarbons cause no direct health effects by

recommendation to the following effect:

> It is reasonable and prudent to conclude that, when promulgating ambient air quality standards, consideration should be given to requirements for margins of safety which take into account long-term effects on health and materials occurring below the above levels.[62]

This recommendation was directed at the local, state, and interstate agencies which were, at that time, responsible for setting air quality standards.[63]

The 1970 Amendments dealt with the challenges HEW had encountered in two ways. First, as noted, the Amendments required for the first time a "margin of safety" in air quality standards, thus accepting the recommendation HEW had made in its criteria documents.[64]

Second, Congress endorsed the criteria documents HEW had so far compiled. Congress did not require HEW to reevaluate any existing criteria, as it had done in 1967 with

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themselves; they cause adverse effects only by interacting with other pollutants to form ozone. 1970 HC Criteria Doc., *supra*, at 8-5.

[62] 1969 PM Criteria Doc., *supra*, at 189; *see also* 1970 Ozone Criteria Doc., *supra*, at 10-13; 1970 CO Criteria Doc., *supra*, at 10-6; 1971 NO Criteria Doc., *supra*, at 11-12.

[63] Congress was well aware of HEW's practice of recommending margins of safety for air quality standards. In a Senate hearing during the crafting of the 1970 amendments, the head of the HEW unit responsible for developing air quality criteria and standards noted HEW's practice of including a margin of safety in its recommendations, claiming that the margin of safety corrected for the fact that "the no-effect level always corresponds . . . to the limitations of scientific knowledge in this area." *Air Pollution – 1970: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. (May 27, 1970) (statement of Dr. John T. Middleton, Commissioner, National Air Pollution Control Administration, HEW).

[64] The Senate report on the legislation explained that "margins of safety are essential to any health-related environmental standards if a reasonable degree of protection is to be provided against hazards which research has not yet identified." S. Rep. No. 91-1196, at 10.

respect to the sulfur oxides criteria. Moreover, not only did Congress require air quality standards to be "based on" the criteria rather than merely "consistent with" them,[65] it also required EPA to *base the very first NAAQS on HEW's existing criteria.*[66] These facts signal a congressional endorsement of HEW's basic approach in the criteria documents compiled as of 1970–an approach which featured inquiry only into the consequences for health and welfare of pollutants in the ambient air; close attention to the effects of air pollution on sensitive segments of the population;[67] and knowing recognition of the difficulties of drawing a bright line between pollution that is harmful and pollution that is not.

Congress substantially revised the Clean Air Act again in 1977, making three important adjustments to the NAAQS-setting process. First, Congress added the requirement that the criteria and the NAAQS be reviewed and, if appropriate, revised, every five years.[68] Second, Congress required EPA to create and to consult with CASAC.[69] Finally, Congress altered the requirements for determining which pollutants were

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[65]*Compare* Air Quality Act of 1967, Pub. L. No. 90-148, sec. 108(c)(1), § 2, 81 Stat. 491, *with* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, sec. 109(b)(1), § 4(a), 84 Stat. 1680.

[66]*See* CAA §109(a)(1)(A), 42 U.S.C. §7409(a)(1)(A) (requiring EPA Administrator to issue, within 30 days from the enactment of the 1970 amendments, primary and secondary NAAQS "for each air pollutant for which air quality criteria have been issued prior to such date").

[67]The 1970 Senate Report emphasized that "[c]oncern for health effects must extend beyond "normal" segments of the population to effects on the very young, the aged, the infirm, and other susceptible individuals." S. Rep. No. 91-1196, at 7. More specifically, the Report stressed that NAAQS were to protect the health of sensitive subpopulations such as bronchial asthmatics and emphysematics. *Id.* at 10.

[68]*See* Clean Air Act Amendments of 1977, Pub. L. 95-95, sec. 109(d)(1), §106(a), 91 Stat. at 691.

[69]*See* sec. 109(d)(2), § 106(a), 91 Stat. at 691.

subject to the NAAQS program: whereas in 1970 Congress had specified that the program applied to a pollutant if it "*has* an adverse effect on public health or welfare,"[70] in 1977 it provided that the program applied to a pollutant if it "*may reasonably be anticipated* to endanger public health or welfare."[71] This amendment followed directly from EPA's experience in regulating airborne lead.[72]

In sum, an extraordinary pattern of dialogue and collaboration between Congress and the executive has characterized the history of federal air pollution control. In ways large and small, Congress has continually adjusted EPA's course in implementing the Clean Air Act. Congress has even passed legislation in response to the very standards at issue in this case.[73]

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[70]Clean Air Act Amendments of 1970, Pub. L. No. 91-604, sec. 108, § 4(a), 84 Stat. 1678 (emphasis added).

[71]Clean Air Act Amendments of 1977, Pub. L. 95-95, sec. 108(a)(1)(A), §401(a), 91 Stat. at 791 (emphasis added).

[72]The House Report accompanying the 1977 amendments explained that the inclusion of the "may reasonably be anticipated" language was a direct response to *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976) (upholding EPA' regulation of lead in gasoline), and was meant "to emphasize the preventive or precautionary nature of the act, i.e., to assure that regulatory action can effectively prevent harm before it occurs" and "to reflect awareness of the uncertainties and limitations in the data which will be available to the Administrator in the foreseeable future to enable him to execute his duties under this act." H.R. Rep. No. 95-294, at 43-53 (1st Sess. 1977).

[73]*See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, §§ 6101-04, 112 Stat. 463-65 (1998). This legislation adjusted the deadlines for designating areas pursuant to the revised NAAQS, although it did not alter the standards themselves. §§ 6102(c)(1), 6102(d), 112 Stat. at 464-65 (adjusting deadlines for designations under new PM NAAQS); § 6103 , 112 Stat. at 465 (adjusting deadlines for designations under ozone NAAQS); § 6104, 112 Stat. at 465 (stating that statute should not be construed to affect pending litigation or to ratify revised standards).

B. Rulemakings on Particulate Matter and Ozone

1. Particulate Matter

Particulate matter (PM) refers to a broad class of diverse substances that exist as discrete particles–in solid or liquid form–over a wide range of sizes. Particles originate from a variety of stationary and mobile sources as well as from natural sources. They may be either emitted directly or formed in the atmosphere through transformations of pollutants such as sulfur oxides, nitrogen oxides, and volatile organic compounds. The chemical and physical characteristics of PM vary substantially with time, region, meteorology, and source category. *See* NAAQS for PM, 62 Fed. Reg. at 38,652-53.

EPA first promulgated a NAAQS for PM in 1971. 36 Fed. Reg. 8186. In July 1987, in response to a revised criteria document, EPA changed the size of the particulates regulated by the NAAQS to include only particulates with an aerodynamic diameter of less than or equal to a nominal ten microns (PM_{10}). 52 Fed. Reg. 24,854 (1987).

In April 1994, EPA announced its intention to develop revised air quality criteria for PM. The focus of the review was recent epidemiological evidence reporting associations between ambient concentrations of PM and a range of serious health effects, including effects caused by particulates far smaller than ten microns. During the next two years, the agency held several workshops, provided opportunities for public comment on a draft criteria document, and sponsored CASAC review of the document at public meetings.

On November 27, 1996, EPA announced its proposed decision to revise the PM NAAQS. 61 Fed. Reg. 65,638. EPA proposed adding two new PM NAAQS that addressed particulates with an aerodynamic diameter less than or equal to a nominal 2.5 microns ($PM_{2.5}$). The Administrator described several alternatives for the level, averaging time, and form of the revised PM standards, including possible changes in the

then-existing PM_{10} NAAQS. *Id.* at 65,662.

On July 18, 1997, EPA announced final revisions to its PM NAAQS. 62 Fed. Reg. 38,652. The Administrator determined that it was appropriate to establish new annual and 24-hour NAAQS for $PM_{2.5}$ and to revise the current 24-hour PM_{10} standard.[74] The Administrator noted that that the agency had undertaken an especially rigorous review and reanalysis of existing scientific data and that recent studies provided "evidence that serious health effects (mortality, exacerbation of chronic disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban airsheds even at concentrations below current U.S. PM standard." *Id.* at 38,655. The Administrator further described the results of risk assessments for two cities that, while accompanied by significant scientific uncertainty, "found that the risk remaining after attaining the current PM_{10} standards was on the order of hundreds of premature deaths each year, hundreds to thousands of respiratory-related hospital admissions, and tens of thousands of additional respiratory related symptoms in children." *Id.* at 38,656.

2. Ozone

Photochemical oxidants are formed as a result of chemical reactions of volatile organic compounds, nitrogen oxides, and oxygen in the presence of sunlight. Ozone is the photochemical oxidant that exists in greatest volume and is

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[74]For $PM_{2.5}$, EPA set a annual standard of 15 micrograms per cubic meter ($\mu g/m^3$) with compliance measured based on the three-year average of the annual arithmetic mean $PM_{2.5}$ concentrations from single or multiple community-oriented monitors, and also set a 24-hour standard of 65 $\mu g/m^3$ based on the three-year average of the 98th percentile of 24-hour $PM_{2.5}$ concentrations at each population-oriented monitor within an area. EPA changed only the form of the PM_{10} standard. NAAQS for PM, 62 Fed. Reg. at 38,652.

regulated as the surrogate for photochemical oxidants.[75] The control of ozone depends on the control of its precursors, volatile organic compounds and nitrogen oxides.

EPA first issued a NAAQS for photochemical oxidants in 1971. 36 Fed. Reg. 8186. The original standard specified a maximum level of 0.08 ppm, averaged over one hour, with one exceedance allowed per year. 36 Fed. Reg. at 8187. That standard was revised in 1979 by increasing the allowable level to 0.12 ppm and changing the form of the standard. 44 Fed. Reg. 8202 (1979).

The EPA initiated a review of the air quality criteria and standards for ozone in August 1992. In an iterative process involving EPA staff, CASAC, and the public, EPA developed a criteria document and staff paper on the health and welfare effects of ozone. The CASAC panel concluded that the one-hour standard should be replaced with an eight-hour standard; the level of the standard should be within the range of 0.07 to 0.09 ppm; and the form of the standard should be changed to allow two to five exceedances. Letter from George T. Wolff, CASAC Chair, to Carol Browner, EPA Administrator, regarding CASAC closure on EPA's staff paper for the primary ozone standard(Nov. 30, 1995) <www.epa.gov/science1/casac02.pdf>.

On November 27, 1996, EPA proposed to revise the NAAQS for ozone. 61 Fed. Reg. 65,716. EPA proposed to replace the one-hour, 0.12 ppm primary standard with an eight-hour, 0.08 ppm standard, and to establish a new form for measuring compliance with the standard. The proposal solicited comments on alternative standards reflecting different levels, averaging times, and forms. *Id.* at 65,731, 65,733.

On July 18, 1997, EPA announced final revisions to its ozone NAAQS. 62 Fed. Reg. 38,856 (1997). The final rule set a level of 0.08 ppm, with an averaging time of eight hours and a form based on the 3-year average of the annual fourth-highest daily

[75]NAAQS for Photochemical Oxidants, 44 Fed. Reg. 8202 (1979).

maximum 8-hour average ozone concentrations measured at each monitor within an area. *Id.* at 38,873.[76]

In revising the ozone standard, the Administrator invoked a large body of scientific evidence consisting of clinical, epidemiological, and animal studies revealing the adverse effects of ozone at levels allowed by the previous standard. 62 Fed. Reg. at 38,863-65. She cited "clear evidence from human clinical studies" showing that the adverse effects from exposure to ozone include "lung function decrements, respiratory symptoms (e.g., cough, pain on deep inspiration), nonspecific bronchial responsiveness, and biochemical indicators of pulmonary inflammation." *Id.* at 38,863. The Administrator also relied on the numerous epidemiological studies drawing a link between ozone exposures and excess hospital admissions and emergency room visits. *Id.* at 38,864.

In setting the parameters for the revised ozone standard, the Administrator noted that CASAC had unanimously endorsed an eight-hour averaging period and that all CASAC members who had expressed specific opinions on the form of the standard had favored a concentration-based form allowing multiple exceedances. 62 Fed. Reg. at 38,861, 38,869. As for the level of the standard, the Administrator considered alternatives only within the range endorsed by CASAC (0.07 to 0.09 ppm). She acknowledged that no one correct policy response emerged from the scientific evidence. *Id.* at 38,863. In choosing between levels of 0.09, 0.08, and 0.07, however, the Administrator emphasized that no member of CASAC had endorsed the 0.07 level and stressed that severity of effects decreased, and uncertainty increased, at levels below 0.08 ppm. *Id.* at 38,854, 38,868. In rejecting the 0.09 ppm level, the Administrator emphasized that such a standard would result

[76]The original standard for ozone, set in 1971, also had a level of .08 ppm – but this was averaged over one rather than eight hours, and fewer exceedances were permitted on average per year, 36 Fed. Reg. at 8187, thus apparently making today's ozone standard more lenient than the original standard promulgated almost 30 years ago.

in many more adverse health effects, particularly among children, than would the 0.08 ppm level. *Id.* at 38,867-68.[77]

C. The Court of Appeals' Decision

Numerous parties filed petitions for review of EPA's revised standards in the D.C. Circuit. The D.C. Circuit found that EPA's application of the Clean Air Act in these rulemakings effected a "delegation of legislative power" in violation of Article I, § 1, of the Constitution. State Petitioners' Appendix to Petition for Certiorari at 3 (State Pet. App.). The court explained that "EPA appears to have articulated no 'intelligible principle' to channel its application of the[] factors [it uses in setting NAAQS]; nor is one apparent from the statute." State Pet. App. 4.

The court came to this conclusion based not on a review of the Clean Air Act itself but on a review of EPA's 1997 rulemakings on PM and ozone. The court found the agency's explanations for its rules constitutionally deficient because they did not identify a "stopping point" for regulation. State Pet. App. 10. Although the court agreed that the factors EPA considers in setting the NAAQS–such as the nature and severity of health effects, the size of the affected population, and the kind of health information available and the uncertainties surrounding it–were reasonable, it concluded that these factors "do not themselves speak to the issue of degree." State Pet. App. 6. The court also dismissed as irrelevant the exhaustive scientific review underlying EPA's

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[77]In both rulemakings, EPA went to extraordinary lengths to facilitate public participation: the agency established a toll-free telephone hotline; set up a system enabling electronic comments via the Internet; held multiple public meetings at which over 400 citizens and organizations testified; fielded over 14,000 phone calls and over 4,000 electronic mail messages; and held two national satellite telecasts to answer questions. EPA also received over 50,000 written and verbal comments. *See* 62 Fed. Reg. at 38,656; 62 Fed. Reg. at 38,858.

standards. *See* State Pet. App. 8.

The court remanded the case to EPA. The court acknowledged that allowing EPA to correct the constitutional defect the court had discerned in the statute would not satisfy what it called a "key function of non-delegation doctrine," which is to ensure that Congress, not the agency, exercises legislative authority. State Pet. App. 12-13. Indeed, the court conceded that, under its approach, "[t]he agency will make the fundamental policy choices." State Pet. App. 13.

The court hinted at the kinds of standards that might pass constitutional muster. The court acknowledged that its first proposal–cost-benefit analysis–was not open to EPA given the court's precedents interpreting the Clean Air Act to forbid EPA to consider costs in setting the NAAQS. *See* State Pet. App. 13. Alternatively, the court proposed that EPA develop a "generic unit of harm that takes into account population affected, severity and probability." More specifically, the court endorsed setting environmental standards according to their effect on "quality-adjusted life-years," State Pet. App. 15, although it conceded that the Department of Health and Human Services had determined that a similar approach utilized by Oregon in the health-care context violated the Americans with Disabilities Act. State Pet. App. 15 n. 5.

The court also addressed claims that EPA could neither issue nor enforce a revised ozone standard. The court found that EPA could indeed issue a revised ozone standard, and also designate areas as nonattainment under the revised standard. *See* State Pet. App. 31-34. However, the court concluded that EPA could not enforce a revised ozone standard "other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." State Pet. App. 31.

The court reasoned that because section 181(a)(1) of Subpart 2 refers to nonattainment designations made under "section 7407(d)," the classifications and attainment dates specified in Subpart 2 apply to areas designated as nonattainment under

any of the provisions of section 107(d). State Pet. App. 34-35. Thus, areas designated nonattainment under section 107(d)(1), following the revision of a NAAQS, would be governed by Subpart 2. Having found the statute clear, the court refused to defer to EPA's interpretation, which would have allowed enforcement of the revised standard outside of Subpart 2. State Pet. App. 37-39.

The court granted partial rehearing and modified its opinion to state that EPA could enforce the revised ozone standard "only in conformity with Subpart 2." State Pet. App. 75. Although he had dissented from the original panel decision, Judge Tatel concurred in this aspect of the decision on rehearing because he believed that the modified opinion left open "the possibility that EPA can enforce the new ozone NAAQS without conflicting with Subpart 2's classifications and attainment dates." State Pet. App. 76. He concluded that EPA may enforce the revised ozone standard in areas that have attained the prior, one-hour standard, but not in areas that have not yet attained that standard. State Pet. App. 81.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the Clean Air Act, and EPA's longstanding interpretation of it, violate the nondelegation doctrine.

a. The Clean Air Act places significant constraints on EPA's discretion in setting the NAAQS. The Act prescribes the factors EPA may and may not consider in setting the NAAQS; requires a margin of safety in the NAAQS as an antidote to scientific uncertainty; limits the range of pollutants regulated by the NAAQS program; limits the life span of each NAAQS; and imposes significant procedural constraints on EPA's decisionmaking, including a scientific review process as intensive as any on the statute books. In truth, the Clean Air Act's manifold constraints on EPA's discretion make the statute look like a veritable straitjacket compared to the

assignments of authority from Congress to the executive that this Court has long upheld.

b. The history of the NAAQS program shows Congress's deep involvement in the development of the program. Congress has not only made all of the most basic and important decisions that arise in setting air quality standards, it has also done so by attending to the executive's experience in setting such standards. Congress has responded to the kinds of challenges that arise in setting environmental standards in the face of persistent scientific uncertainty not by foisting ever more responsibility onto an executive agency, but by tackling the basic issues itself. Far from abdicating its legislative role in this setting, Congress has embraced it.

c. The court below erred in (implicitly) fashioning a new requirement under the nondelegation doctrine–one that demands that guidance for administrative action come in quantitative form. This Court's decisions have squarely rejected such a requirement. Moreover, air pollution control would be an exceedingly inappropriate context in which to create such a requirement. The air pollutants regulated by the NAAQS program cause a diverse array of adverse effects on human health and welfare through a wide range of causal mechanisms. The uncertainties that surround predictions of these effects also come in a wide variety of shapes and sizes. Requiring a quantitative meta-standard to govern the setting of air quality standards would effectively shut down the federal program of air pollution control and turn the nondelegation doctrine into an agent of regulatory paralysis.

2. Respondents Massachusetts and New Jersey anticipate that the Solicitor General's brief for the federal government will adequately treat the second issue on which this Court has granted review, involving the finality and ripeness of the court of appeals' decision on the scope of EPA's authority to implement the revised ozone standard. Thus we will not discuss this issue in our brief.

3. The court of appeals erred in finding that EPA may not

enforce the revised ozone standard "other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." Under the court's ruling, EPA may find the prior one-hour ozone standard to be insufficient to protect the public health and thus may revise that standard, but upon revising it, it is limited to the enforcement regime set forth in Subpart 2–which features, for example, many deadlines that passed long ago. Nowhere does the Clean Air Act suggest, let alone compel, a finding that Congress intended such an absurd result. On the contrary, careful review of the language, history, and purpose of Subpart 2 clearly shows that it applies only to the ozone standard existing in 1990.

ARGUMENT

I. THE CLEAN AIR ACT DOES NOT DELEGATE LEGISLATIVE AUTHORITY TO THE EXECUTIVE IN VIOLATION OF THE CONSTITUTION.

Because it found no numerical "cut-off point" for national air quality standards in either the Clean Air Act itself or EPA's interpretation of it, the court of appeals held that neither the statute nor EPA's interpretation provides the "intelligible principle" that this Court has required of assignments of authority from Congress to the executive. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). In so holding, the court revealed a deep misunderstanding of this Court's nondelegation doctrine.

This Court has never required that congressional assignments of authority to the executive take a particular *form*, be it numerical or otherwise. Instead, this Court has long held that "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the

principle of separation of powers has occurred." *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Mistretta v. United States*, 488 U.S. 361, 379 (1989), and *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

Applying this well-settled rule, this Court has upheld numerous broad assignments of authority to the executive. *See, e.g., National Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (affirming Federal Communication Commission's authority to regulate broadcast licensing in the "public interest"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (upholding FCC's authority to issue regulations "as public convenience, interest, or necessity requires"); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (upholding Federal Power Commission's authority to determine "just and reasonable rates"). In recent years, this Court has strongly reaffirmed Congress's authority to use broad guidelines in assigning authority to the executive. *See Skinner*, 490 U.S. 212; *Touby v. United States*, 500 U.S. 160 (1991); *Loving v. United States*, 517 U.S. 748 (1996).

In determining whether Congress has satisfied the requirements of the nondelegation doctrine, this Court's unbroken practice has been to consult the challenged statute itself–its language, purpose, history, and context. *See, e.g., American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). Examination of these features of the Clean Air Act demonstrates that the Act is constitutional.

A. The Language And Purpose Of The Clean Air Act Significantly Constrain Agency Discretion.

In the Clean Air Act, Congress has answered all of the most difficult and basic questions about the structure and content of the NAAQS program. It has described in detail the substantive requirements for these standards; limited their jurisdictional reach; and set forth the procedures to be followed in setting them. As explained below, at every

important decision-point in the process of setting air quality standards, EPA's discretion is constrained by a choice Congress has made. With its multiple substantive constraints on the actions of a federal agency, its limited jurisdictional reach, and its abundant procedural protections, the Clean Air Act is clearly constitutional.

Substantive constraints. The Clean Air Act places numerous substantive constraints on EPA's decisions setting the NAAQS. First of all, the Act constrains EPA's discretion by excluding some factors from EPA's consideration. In setting the NAAQS, EPA may consider only the effects of the relevant air pollutant on human health and welfare.[78] As EPA has recognized since it issued the very first NAAQS thirty years ago, it may not consider economic and technological feasibility in setting the NAAQS.[79] In excluding the consideration of costs and technology and focusing only on human health and welfare, Congress squarely confronted the most difficult and most basic choice a decisionmaker faces when devising environmental standards–whether the government should trade off human lives and health for dollars–and firmly answered "no." *Cf. Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring in judgment) ("*Benzene*").

Second, the Act also sets forth the factors EPA *must* consider in establishing the NAAQS. NAAQS must be "based on" the air quality criteria, CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1), which, in turn, must be based on "the latest scientific knowledge useful in indicating the kind and extent of all

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[78]*See* CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1) (NAAQS to be "based on" air quality criteria); CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2) (criteria to describe scientific information on health and welfare effects of pollutants).

[79]*See* 36 Fed. Reg. 8186 (1971) (explaining that EPA did not consider comments concerning feasibility because "the Clean Air Act, as amended, does not permit any factors other than health to be taken into account in setting the primary standards").

identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air . . . ." CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2). Virtually every one of the words in the quoted passage significantly constrains EPA's discretion.

EPA must base the NAAQS on *the latest scientific* knowledge–not on outdated information, not on nonscientific data. EPA must be cognizant of *all identifiable effects* on public health and welfare. Yet the agency must also bear in mind the *kind and extent* of these effects–which is another way of saying that EPA should distinguish among effects based on their severity and magnitude.

In addition, the statute's emphasis on *public* health directs EPA's attention to populations rather than individuals, thus precluding EPA from setting a NAAQS in order to protect a single individual from harm. In this way, the Clean Air Act is very different from the Occupational Safety and Health Act, at issue in *Benzene*. That statute aspires to achieve workplaces in which "*no employee*" suffers a "material impairment of health or functional capacity" from toxic materials or harmful physical agents. 448 U.S. at 612 (emphasis added). A plurality of Justices thus worried that the statute might allow the government to require large expenditures based on "the mere possibility that some employee somewhere in the country may confront some risk of cancer." *Id.* at 652. Such a "possibility" is simply not the basis for regulation under the Clean Air Act.

In so prescribing the range of findings EPA must make and the range of factors it must consider, the Clean Air Act is a close cousin to the statutes this Court has recently upheld against nondelegation challenges. *See Touby*, 500 U.S. at 166-67; *Skinner*, 490 U.S. at 219-20; *Mistretta*, 488 U.S. at 375-77.[80]

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[80]Indeed, in *Loving v. United States*, 517 U.S. 748 (1996), this Court concluded that the federal statute giving the President authority to define the aggravating factors that permit a court-martial to impose the death penalty need not give *any* guidance to the executive in order to survive a nondelegation challenge. *See Id.* at 772-73.

The Clean Air Act not only tells EPA what to consider in setting the NAAQs, it also gives the agency a great deal of guidance as to the ultimate content of the standards. First of all, EPA must set the primary NAAQS at a level which is "requisite to protect the public health." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). The use of the term "requisite" limits EPA's standard-setting discretion on both the low and high ends; it implies a degree of necessity for the standards and yet also forbids the Administrator to set standards inadequate to protect the public health.

In addition, EPA must allow "an adequate margin of safety" in setting the primary NAAQS. CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). The requirement of a margin of safety prescribes a particular approach toward scientific uncertainty for EPA; where the science is uncertain, it tells EPA to lean toward the more stringent end of the range of alternative standards rather than toward the less stringent end.

Finally, the NAAQS for any given pollutant must be uniform throughout the country. *See* 42 U.S.C. § 7409(a)(1). The question whether to permit variations in the national air quality standards[81]–to account for differing regional or local conditions in weather, population densities, etc.–is a public policy issue of the highest order. Congress squarely addressed that issue and decided against nonuniform standards. In this way as well, the Clean Air Act resembles the statute upheld against a nondelegation challenge in *Skinner*, which precluded a case-by-case determination of the governing rules and opted instead for a uniform rule. *See* 490 U.S. at 219.

Jurisdictional limits. The NAAQS apply to only a limited subset of air pollutants – widespread pollutants (i.e., those from "numerous and diverse sources") that endanger public health or welfare. CAA § 108(a)(1), 42 U.S.C. § 7408(a)(1). Indeed, since 1978, as noted above, the NAAQS program has

[81]States are free, of course, to set stricter standards if they wish, CAA § 116, 42 U.S.C. § 7416, but the *national* standards must be uniform.

been limited to only *six* air pollutants, out of the many hundreds of such pollutants that exist today.[82] Thus, as in *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939), the territory over which the executive's discretion may range is extremely limited. *See id.* at 576 (authorizing Secretary of Agriculture to issue orders with respect to only certain kinds of agricultural commodities).

The reach of any given NAAQS is limited as well. EPA must review every NAAQS, and the criteria on which the NAAQS are based, every five years. *See* CAA § 109(d)(1), 42 U.S.C. § 7409(d)(1). This requirement has caused EPA to conduct numerous reviews and revisions of the criteria and NAAQS. See note 3, *supra*. Indeed, the NAAQS at issue here grew out of EPA's obligatory review of the criteria documents for PM and ozone. EPA's continuing obligation to revisit the criteria and NAAQS means that the life span of any given NAAQS is limited to the period in which the scientific data on which it is based remains reliable.

In the latter respect, the Clean Air Act is more restrictive than some congressional assignments of authority this Court has upheld. In *Field v. Clark*, 143 U.S. 649 (1892), this Court affirmed Congress's authority to assign to the President the task of suspending free trade in certain commodities, under certain conditions, "*for such time as he shall deem just.*" *Id.* at 680 (emphasis added). The Court concluded that the President "had no discretion in the premises except in respect to the duration of the suspension so ordered," and that this discretion "related only to the enforcement of the policy established by Congress." *Id.* at 693. In limiting the duration of any one decision on the NAAQS, therefore, the Clean Air Act is more restrictive than the statute upheld in *Field*.

Procedural requirements. The Clean Air Act also contains

[82]The Clean Air Act's program addressing toxic air pollutants, for example, covers approximately 180 different pollutants. *See* CAA § 112(b)(1), 42 U.S.C. § 7412(b)(1).

numerous procedural requirements that further limit the Administrator's actions. First of all, the Act requires EPA to develop and rely on the criteria document. In providing that the original NAAQS were to be based on the criteria documents HEW had compiled as of 1970,[83] the Act guides EPA's development of the criteria on which the NAAQS depend. As discussed in our Statement, *supra*, at 14-17, HEW's criteria considered only scientific information on pollutants' effects on health and welfare; looked carefully at effects on especially vulnerable subpopulations; and candidly acknowledged the uncertainties attendant upon predicting the adverse effects of air pollution. Congress's endorsement of HEW's criteria documents thus provides substantial guidance to EPA in its development of such documents.

Second, the Act also requires EPA to consult with CASAC in formulating the criteria and in shaping NAAQS in light of the criteria. The Administrator may significantly depart from CASAC's recommendations only if she explains why she has done so. CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3). In this case, when CASAC was able to achieve a scientific consensus, the Administrator's actions hewed closely to it. In setting the ozone standard, for example, the Administrator considered ozone levels only within a range approved by CASAC and declined to set the standard at the lowest end of that range in part because no member of CASAC had endorsed such a low standard. NAAQS for Ozone, 62 Fed. Reg. at 38,861, 38,868.

Third, the Administrator's actions are subject to the exacting requirements of the Administrative Procedure Act and judicial review for arbitrariness. This Court has suggested that procedural requirements and the availability of judicial review are important factors in evaluating the propriety of Congress's assignments of authority to the executive branch. *See American Power & Light Co.*, 329 U.S. at 105; *Touby*, 500 U.S. at 168-69.

Finally, the administrative official–the Administrator of the

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[83]CAA §§ 109(a), (b), 42 U.S.C. §§ 7409(a), (b).

EPA–to whom authority is granted is "clearly specified," and is a politically accountable official of "high governmental authority." *Lichter v. United States*, 334 U.S. 742, 787 (1948).[84]

Containing as it does these manifold constraints on the substance, scope, and process of the NAAQS program, the Clean Air Act compares extremely favorably to the assignments of authority from Congress to the executive that this Court has upheld, many of which have left large and basic questions for the agency to address.[85] In addition to the cases already cited above, see, for example, *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *OPP Cotton Mills v. Administrator Wage & Hour Div., Dept. of Labor*, 312 U.S. 126 (1941); *Yakus v. United States*, 321 U.S. 414 (1944).

Furthermore, the Clean Air Act is a world away from the only statute this Court has ever invalidated under the delegation doctrine. In two cases decided in 1935, this Court invalidated two separate provisions of the National Industrial

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[84]Furthermore, because the Administrator is charged not only with setting the NAAQS but also with ensuring their implementation by the states, CAA §§ 110, 179, 42 U.S.C. §§ 7410, 7509, and because the NAAQS themselves contain elements–such as their "form"–that partake of both lawmaking and executive functions, this case does not present a situation in which the entity to whom authority has been assigned exercises nothing but the lawmaking function. *Cf. Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting).

[85]As one member of the Court has aptly observed:

> By no means can the environmental laws be considered among those conferring the greatest amount of discretion upon the agencies. In fact, they are probably among those conferring the least. Not only is general policy not left to be disposed of by the agencies under the general standards of "public interest, convenience and necessity," but in some areas even cost-benefit analysis is excluded. For example, national primary ambient air quality standards are to be established not in light of what is "feasible" or "reasonable" (a formulation that would enable counterbalancing costs to be offset against the benefit of clean air) but rather on the sole basis of what is "requisite to protect the public health."

Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 102 (1987) (citing CAA § 109(b), 42 U.S.C. §7409(b)).

Recovery Act of 1933. In *A.L.A. Schechter Poultry Corp. v. United States*, 293 U.S. 495 (1935), the Court zeroed in on the delegation of lawmaking authority to private groups in invalidating section 3 of the statute, *id.* at 521-25, and in *Panama Refining Co. v. Ryan*, 295 U.S. 388 (1935), the Court fixed on the lack of any operative rule in invalidating a criminal conviction under section 9 of the statute. *Id.* at 412-13. *See also Clinton v. City of New York*, 524 U.S. 417, 486 (1998) (Breyer, J., dissenting) (noting distinctive facts of both cases). Neither of these extreme circumstances is present here.

The Clean Air Act clearly lays down the "intelligible principle" that this Court has required of assignments of authority from Congress to the executive. Moreover, given that EPA has interpreted the Act in a way that heeds all of these constraints on its own discretion, the EPA's *interpretation* of the Act is likewise constitutional.

B. The History Of The Clean Air Act Unequivocally Shows That Congress Has Not Forsaken Its Legislative Duties.

The delegation doctrine "has developed to prevent Congress from forsaking its duties." *Loving*, 517 U.S. at 758. It is thus highly relevant that Congress has, from the beginning, kept an exceedingly close eye on the development of air quality criteria and standards and has frequently altered statutory requirements in response to agency decisions and experience. Far from abdicating its legislative role, Congress has actively shaped the contours of the federal program protecting air quality. Indeed, all of the constraints discussed in the preceding section were forged in Congress based on an ongoing dialogue with the executive agency charged with implementing the Clean Air Act.[86]

Congress entered the field of air pollution regulation with

[86]The discussion that follows is more fully presented, with detailed supporting citations, in our Statement of the Case, *supra*, at pp. 7-19.

some reluctance. It began its efforts to address the problem of air pollution by putting the federal government in the role of supporting state and local governments' own regulatory efforts through research and, eventually, through the development of criteria documents describing the consequences of air pollution for human health and welfare. Only after over a decade had passed in which little progress had been made in controlling air pollution did Congress require the federal government itself to regulate the quality of the outdoor air. Thus, the question of *who* sets the NAAQS was resolved, and resolved in favor of having the federal government set them, only after considerable deliberation. What is more, when Congress enlarged the federal role in this way, it at the same time narrowed the class of pollutants to which the air quality standards would apply.

The content of the standards themselves was also refined over a period of years. When states and local governments were expected to set air quality standards, there was no requirement of uniformity among the standards. When Congress gave EPA authority to set national standards, however, it made them nationally uniform. Likewise, when states and local governments were setting the standards, there was no requirement that a margin of safety be incorporated in the standards. In its criteria documents, however, HEW had discovered that the lowest pollution levels at which health effects are detected may not be the lowest level at which such effects occur. Thus it recommended that a margin of safety be incorporated in state and local air quality standards, and Congress endorsed this recommendation in the 1970 amendments to the Clean Air Act. And, last, when the standards were set by states and local governments, they needed only to be "consistent with" the air quality criteria developed by HEW; when EPA was given the responsibility of setting the NAAQS, however, the standards were required to be "based on" the air quality criteria. At the same time as it more closely tied the standards to the criteria, Congress also

gave more guidance as to what the criteria themselves should contain: it required that the very first NAAQS be based on the criteria documents HEW had already compiled, documents which highlighted sensitive subpopulations and scientific uncertainty, two themes that continue to characterize air pollution research and control to this day.

Finally, when Congress in 1970 greatly increased the federal government's role in the regulation of air pollution, it also strengthened the procedural protections attendant upon the government's decisions. The requirement that EPA consult with CASAC regarding the criteria and standards, the obligation to review and, if appropriate, revise the criteria and NAAQS at least every five years, and the opportunity for public comment and judicial review, all emerged in tandem with the federal government's increasing role in protecting the quality of the air we breathe.

The current shape and content of the air quality criteria and standards are thus the products of not just one, but many, congressional decisions made over a period of decades. These congressional decisions, moreover, came in response to the executive's own experience in implementing federal air pollution policy. The tradition of dialogue and collaboration between Congress and the executive reflected in these decades of congressional and executive actions shows that the purpose of the nondelegation doctrine–to prevent Congress from forsaking its legislative role, *Loving*, 517 U.S. at 758–is amply satisfied by the active congressional engagement that has given the Clean Air Act the form it has today.

C. The Context Of The Clean Air Act–The Control Of Air Pollution In Conditions Of Uncertainty–Would Be A Particularly Inappropriate Setting For A Reworking Of The Nondelegation Doctrine.

As explained above, the Clean Air Act clearly satisfies this Court's requirements for assignments of authority from

Congress to the executive. The court below, however, seems to have believed that a reworking of these requirements was appropriate in this context. Specifically, the court seems to have required–from Congress *or* EPA, it did not care which, State Pet. App. 12-13–*numerical*, or *quantitative*, guidance for the agency. This new requirement is evident in the court's hints as to the kinds of guidance that would, in its view, be constitutionally satisfactory: cost-benefit analysis, "generic unit[s] of harm," and quality-adjusted life-years. State Pet. App. 13-17. All of these approaches would make regulatory action turn on quantitative guidelines.

This Court has never required the kind of quantitative guidance from Congress (or from the agency itself) that the court of appeals seems to have required. Indeed, in the flood of delegation litigation inspired by his Court's rulings in *Schechter* and *Panama Refining*, this Court addressed and rejected precisely this kind of claim. In a series of cases brought before the Court in the 1940s, regulated entities objected to giving *any* policymaking discretion to agencies at all, and the federal government responded by denying, for example, that Congress was required to establish a "mathematical formula" for agency action. Brief for United States at 62, *Lichter v. United States*, 334 U.S. 742 (1948) This Court squarely rejected the claim that Congress must speak with mathematical precision:

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.

Lichter, 334 U.S. at 785. The Court recognized that requiring such specificity from Congress would require forgoing the advantages of turning to an administrative agency in the first place:

> [T]he effectiveness of both the legislative and administrative processes would become endangered if

> Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues.

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

In recent years, this Court has had an opportunity to revisit its precedents upholding Congress's power to assign responsibility to the executive under broad qualitative guidelines. In *Skinner*, 490 U.S. 212, the Court faced a challenge to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. 99-272, 100 Stat. 82. COBRA directed the Secretary of Transportation to set pipeline safety user fees that bore a "reasonable relationship" to volume-miles, miles, or revenues. 490 U.S. at 219. In a unanimous opinion, this Court said that it had "no doubt" that COBRA's restrictions on the Secretary's discretion satisfied the requirements of the delegation doctrine, *id.* at 220, despite the fact that COBRA, like the Clean Air Act, uses qualitative guidelines to govern the establishment of quantitative fees.[87]

This Court also had an opportunity to revisit the nondelegation doctrine in *Touby*, 500 U.S. 160. Petitioner challenged Congress's assignment of authority to the Attorney General to schedule controlled substances–and thus to criminalize their possession and distribution–on a temporary basis. A unanimous Court again had no trouble finding that the Controlled Substances Act's standard of "imminent hazard to public safety"–which required consideration of the drug's "history and current pattern of abuse," the "scope, duration, and significance of abuse," and "what, if any, risk there is to the public health"–was the kind of "intelligible principle"

[87]Indeed, the only significant issue in that case was whether assignments of authority to the executive made pursuant to Congress's taxing power should be scrutinized more strictly than other assignments have been; the answer to this question was no. *See* 490 U.S. at 222-23.

required by its delegation decisions. *Id.* at 166-67. The standard requiring an "imminent hazard to public safety" poses challenges for the Attorney General that are strikingly similar to those faced by EPA in setting the NAAQS. Nowhere in *Touby* did this Court suggest that the Controlled Substances Act was problematic because it did not supply quantitative limits for the Attorney General's discretion.

The notion, embraced by the court below, that a congressional assignment of authority, or an agency's exercise of that authority, is constitutionally defective because it does not specify precise stopping points for regulation would require fundamental restructuring of much of modern government. A good deal of legislation takes precisely the same form that the court of appeals found unconstitutional: a qualitative directive to the agency–to set utility rates that are "just and "reasonable,"[88] to set pipeline fees based on a "reasonable relationship" to revenue and other factors,[89] or to regulate the height and width of bridges to prevent navigational obstructions,[90] to name only a few examples–must be translated by an agency into a numerical rule. The Court has never invalidated this kind of legislation, and it would be a grave error to begin to do so now.

In the context of air pollution control, as in many other regulatory settings, requiring a quantitative meta-standard from Congress (or from an agency) would effectively preclude much governmental action. Given the dynamic nature of scientific inquiry and the multifarious issues that arise when regulating air pollutants that have very different effects, and mechanisms of effects, on human health and welfare, it would be quite impossible to devise in advance a catch-all,

[88]*Hope Natural Gas*, 320 U.S. at 600.

[89]*Skinner*, 490 U.S. at 219.

[90]*Union Bridge Co. v. United States*, 204 U.S. 364 (1907) (upholding against nondelegation challenge federal statute assigning authority to Secretary of War to regulate height and width of bridges over navigable waterways).

quantitative standard to govern all decisions setting NAAQS. The human health effects alone of air pollution – quite apart from the multitudinous effects on human welfare – vary widely, including such different effects as the initiation and aggravation of respiratory diseases including bronchitis[91] and asthma,[92] impairment of the oxygen-carrying capacity of the blood,[93] reduced cognitive capacity,[94] and premature death.[95] Moreover, because air pollutants' harmful mechanisms vary, the technical issues that arise in identifying pollutants' consequences vary as well.[96]

To require Congress (or, as the D.C. Circuit did, the agency) to foresee and address all of the subsidiary issues that arise in regulating air pollutants would be to prevent Congress from assigning authority to the executive at all in this context. This Court has never required such a degree of specificity from Congress as would effectively preclude congressional action on a particular problem. On the contrary, this Court has recognized that "[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government." *Loving*, 517 U.S. at 758. Indeed, it is fair to say that "a certain degree of discretion, and thus of lawmaking,

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[91] *See* 1971 NOx Criteria Doc., *supra*, at 11-8.

[92] *See* 1970 Ozone Criteria Doc., *supra*, at 10-7.

[93] *See* 1970 CO Criteria Doc., *supra*, at 10-3.

[94] *See* EPA, Air Quality Criteria for Lead 13-6 (1977) [hereinafter 1977 Lead Criteria Doc.].

[95] *See* 1967 SOx Criteria Doc., *supra*, at xxix.

[96] *See, e.g.*, 1977 Lead Criteria Doc., *supra*, at 13-1 to 13-4 (discussing complexities of isolating effects of airborne lead exposure from other lead sources and identifying relationship between exposure levels and blood concentrations of lead); 1970 CO Criteria Doc., *supra*, at 10-3 to 10-4 (addressing relationship between carbon monoxide exposure levels and resulting levels of carboxyhemoglobin in blood).

inheres in most executive or judicial action . . . ." *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting). This Court has always held, therefore, that Congress may "seek[] assistance, within proper limits, from its coordinate Branches . . . . Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby*, 500 U.S. at 165. The court of appeals' reworking of the nondelegation doctrine is an effective but misguided means of achieving deregulation through the courts rather than Congress.

II. THE LOWER COURT'S DECISION CONSTRAINING ENFORCEMENT OF THE REVISED OZONE STANDARD IS INCONSISTENT WITH THE CLEAN AIR ACT'S LANGUAGE, HISTORY, AND PURPOSE, AND WITH EPA'S REASONABLE INTERPRETATION OF THE ACT.

Two sets of provisions govern the classifications, attainment dates, and control measures required of areas that are in nonattainment for ozone. The question posed here is which of these sets of provisions governs the implementation and enforcement of EPA's revised ozone standard.

The first candidate is Subpart 1, CAA §§ 171-179B, 42 U.S.C. §§ 7501-7509a. Subpart 1 governs nonattainment areas generally. It allows EPA to classify nonattainment areas according to the severity of their air pollution problem and to fix attainment dates in accordance with EPA's classifications. CAA § 172(a)(1)(A), 42 U.S.C. §7502(a)(1)(A). If, for example, an area has a particularly severe nonattainment problem, it may be given a different classification and later attainment date than an area with a less severe problem. In all events, however, nonattainment areas must achieve the NAAQS no later than five years after their designation as nonattainment areas. CAA § 172(a)(2)(A); 42 U.S.C. § 7502(a)(2)(A). Subpart 1 also allows EPA to require specific reductions in emissions

for the purpose of meeting the NAAQS on schedule. CAA §§ 172(c)(2), 171(1), 42 U.S.C. §§ 7502(c)(2), 7501(1) (requiring "reasonable further progress" as defined by EPA).

The second candidate is Subpart 2, CAA §§ 181-185B, 42 U.S.C. §§ 7511-7511f. In contrast to Subpart 1, Subpart 2 sets forth explicit, rigid classifications and attainment dates for areas in nonattainment for ozone. The classifications, ranging from "moderate" to "extreme," are based on ozone concentrations ("design values") ranging from 0.121 to 0.280 parts per million ("ppm"). CAA §181(a)(1), 42 U.S.C. § 7511(a)(1). The "design values" used to classify areas are based on the statistical form of the ozone standard existing in 1990. *Id.* Most of the explicit attainment dates established in Subpart 2 were in the 1990s. *Id.*

The issue raised here is whether EPA's implementation and enforcement of the revised ozone standard–which specifies a different level and form from the level and form referenced in Subpart 2, and which, if it is to be implemented and enforced at all, must obviously be implemented and enforced *after* the 1990s–must conform to the classifications, attainment dates, and control measures specified in Subpart 2.

The court of appeals answered yes to this question. Because section 181(a)(1) of Subpart 2 refers to nonattainment designations made under "*section 7407(d)*," the court reasoned, the classifications and attainment dates specified in Subpart 2 apply to areas designated as nonattainment under *any* of the subsections of section 107(d)–including subsection 107(d)(1), under which designations are made following the revision of a NAAQS. State Pet. App. 34-35. Thus, classifications, deadlines and requirements for areas designated as nonattainment pursuant to the revised ozone NAAQS are, on the court's view, governed by Subpart 2.

The proper interpretation of the court's ruling is in some doubt even after the court's attempts at clarification on rehearing. Industry petitioners argued below that Subpart 2, added in the 1990 amendments to the Act, "preclude[s] the

EPA from requiring areas to comply either more quickly or with a more stringent ozone NAAQS," and the court apparently agreed with this argument. State Pet. App. 37.[97] This would preclude *any* implementation or enforcement of the revised ozone standard beyond what was already required pursuant to the one-hour standard existing in 1990 (which would be tantamount to saying that the revised standard can be set but cannot be enforced). A second possible interpretation of the court's interpretation was offered by Judge Tatel: he concurred in the court's opinion on rehearing because he thought it left open the possibility that the revised ozone standard can at least be enforced in areas that have achieved the one-hour standard. State Pet. App. 81.

Under either interpretation of the court's ruling, the ruling is erroneous in light of the language, history, and purpose of the relevant provisions of the Clean Air Act. Subpart 2 clearly applies only to the ozone standard existing in 1990, when Subpart 2 was enacted. Where Congress has, as it has done here, answered the "precise question at issue," the Court must abide by Congress's answer. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Even were the provisions less clear than we believe them to be, however, this Court should reach the same result by deferring to EPA's reasonable interpretation of the statute. *Id.*

Section 181(a) of Subpart 2 provides, as its title says, "classifications and attainment dates for 1989 nonattainment areas." CAA § 181(a), 42 U.S.C. § 7511(a). Three out of the five attainment dates specified in section 181(a)(1) of Subpart 2 have already passed. *See* 42 U.S.C. § 7511(a)(1), table 1 (three of the attainment dates are 1993, 1996, and 1999).

Areas "designated nonattainment for ozone pursuant to

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[97]This interpretation is apparently embraced by respondents/cross-petitioners Appalachian Power Co., *et al.* *See* Brief in Response [to the Petitions for Certiorari] for the Respondents Appalachian Power Co. in No. 99-1257, *et al.* at 9, 28.

section 7407(d)" are to be "classified at the time of such designation, under table 1, by operation of law . . . ." 42 U.S.C. § 7511(a)(1). The classifications in table 1 range from "marginal" to "extreme." 42 U.S.C. § 7511(a)(1). These classifications are tied to the area's "design value," which is measured in parts per million ("ppm") of ozone in the ambient air. 42 U.S.C. § 7511(a)(1) (table 1, n. *). The design values in table 1 of section 181(a)(1) range from 0.121 to 0.280 and above. *See* 42 U.S.C. § 7511(a)(1).

Section 181(a)(1) requires that the design value that determines classification under this section be "calculated acccording to the interpretation methodology issued by the Administrator most recently before November 15, 1990." 42 U.S.C. § 7511(a)(1). The relevant interpretation methodology stated that design value was to be calculated based on the fourth highest daily maximum value during a three-year period.[98] EPA focused on this particular value because, at that time, the form of the ozone standard required that the average number of exceedances over a three-year period not be greater than one.[99] Thus the highest three daily values in a three-year period were used to determine the compliance status for an area, and the fourth highest value was used to determine its design value.

The language of Subpart 2 clearly shows that this set of provisions was meant to apply only to the one-hour ozone standard, existing in 1990. First, the title of section 181(a), which sets forth the classifications and attainment dates, is "[c]lassifications and attainment dates for *1989 nonattainment areas*." CAA § 181(a), 42 U.S.C. § 7511(a) (emphasis added). Second, the lowest design value reflected in section 181–0.121

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[98] *See* Memorandum from William G. Laxton, Director, Technical Support Division, U.S. EPA, "Ozone and Carbon Monoxide Design Value Calculations" (June 18, 1990) <http:www.epa.gov/airprogm/oar/oaqps/greenbk/laxton.html>.

[99] *See* NAAQS for Photochemical Oxidants, 44 Fed. Reg. at 8218.

ppm–is keyed to the level of the one-hour standard (0.12 ppm), and hence does not capture the lower values that will be associated with the revised ozone standard which sets a maximum level of .08 ppm. Third, the interpretation methodology that the statute requires to be used in calculating an area's design value mandates use of the statistical form of the *prior one-hour* ozone standard. Finally, the deadlines set forth in Table 1 of section 181(a)(1) are mostly in the past and, likewise, the deadline clocks for the implementation of the specific control measures required by Subpart 2 begin to run from *1990*. *See generally* CAA § 182, 42 U.S.C. § 7511a.

The language of Subpart 1 is equally supportive. Section 172 provides that the Administrator may classify, and set an attainment date for, an area designated as nonattainment "pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (*or any revised standard, including a revision of any standard in effect on November 15, 1990*). . . " CAA § 172(a)(1)(A), 42 U.S.C. § 7502(a)(1)(A) (emphasis added). Clearly, Congress believed that there would be classifications and attainment dates set under section 172(a)(1)(A) for areas designated as nonattainment under a standard revised after November 15, 1990. Yet if the court of appeals is correct, the category Congress sought to create would be a null set: each of the sets of provisions governing areas in nonattainment for NAAQS existing in 1990 (Subparts 2-5) contains the same reference to "section 107(d)" that the court believed made Subpart 1 inapplicable to the revised ozone standard. Thus, under the court of appeals' reasoning, *no* revised standard would be governed by Subpart 1, rendering section 172(a)(1)(A) a nullity.

All of this language from Subparts 1 and 2 points to only one conclusion: Subpart 2 simply does not apply to the revised ozone standard. This conclusion is bolstered by considering the absurd consequences that would flow from a contrary ruling.

First, it is not even possible to classify areas under section

181(a)(1) pursuant to the revised ozone standard, given the constraints of that section. Section 181(a)(1) requires that an area's design value–which determines the area's classification, which in turn determines its attainment date–be calculated according to the interpretation methodology in effect before November 15, 1990. CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). That methodology required use of the statistical form of the ozone standard existing in 1990, not the revised standard. Thus no calculation of a design value under section 181(a)(1) can use the form of the revised standard. Because the form of the ozone standard is a crucial part of the standard itself, this means that design values using the revised ozone standard simply cannot be calculated within the constraints of section 181(a)(1).

That is bizarre enough. Coupling this result with another aspect of the court of appeals' ruling only deepens the awkwardness. Under the court's decision, EPA was permitted, indeed required, to review and, if appropriate, revise the former ozone standard. EPA was also required to designate areas as attainment or nonattainment pursuant to its revised standard. Because section 181(a)(1) provides that classification must occur "at the time of . . . designation," 42 U.S.C. § 7511(a)(1), EPA will also be required to *classify* the areas that it has designated as nonattainment under the revised standard. But because, as just discussed, it is impossible, within the constraints of section 181(a)(1), to set design values and classifications according to the revised ozone standard, EPA will be forced to set such design values and classifications according to the one-hour standard existing in 1990. Thus, in classifying areas pursuant to its obligations under section 181(a)(1), EPA will be forced to do so based on the very ozone standard it has rejected as inadequate to protect public health. The court of appeals' interpretation of section 181(a)(1) thus requires EPA to spend scarce regulatory resources on a pointless exercise yielding no legally relevant data.

The court of appeals' decision leads to obviously wrong results in another way as well. Because most of the deadlines set by Subpart 2 have passed, enforcement of the revised ozone standard either will require a new set of deadlines or will follow from a finding that some areas *are already out of compliance with the revised standard, and have been so for years.* Under the first scenario, the new deadlines cannot come from Subpart 2 because most of the deadlines set in Subpart 2 have already passed. EPA needs the authority to develop a new set of deadlines for meeting requirements under the revised ozone standard, and that kind of authority comes from Subpart 1, not Subpart 2. Under the second scenario, in which the attainment dates of Subpart 2 would control, some areas would be out of compliance with the revised standards as soon as they were designated nonattainment–raising at least the potential that sanctions would be imposed for having missed a deadline that passed before the relevant rule was developed. Both scenarios show the unworkable nature of the court of appeals' decision.

The reference to "section 107(d)" in section 181(a)(1), on which the court of appeals so heavily relied, does not support a different conclusion. The court found that Congress's failure to refer specifically to section 107(d)(4) (rather than to section 107(d) as a whole) meant that EPA could not enforce the revised ozone standard except in conformity with Subpart 2. In so holding, the court of appeals ignored all of the other language in Subpart 2, which supports the opposite conclusion. The consistent exclusive focus of Subpart 2 is the ozone NAAQS existing at the time Congress added Subpart 2 in 1990. Certainly, section 181(a)(1)'s reference to designations made under "section 107(d)" is not incompatible with a finding that the designations central to Subpart 2 are those designations made immediately following the amendments of 1990–designations made pursuant to section *107(d)(4)*.

While it is true that the Senate version of the 1990 bill amending the Clean Air Act contained a reference to the equivalent of section 107(d)(4), and the House version

contained a reference to section 107(d), and the House's version became law, nothing follows from this. Not only, as noted above, does all of the other language of Subpart 2 show that it applies only to the ozone standard existing in 1990, but nothing in the history of this section suggests that Congress – with the omission of a single number "(4)" from a vast bill – intended effectively to preclude EPA from implementing a revised ozone standard. Indeed, the House Report on the bill described the provision that became section 181(a) as follows: "Designated ozone nonattainment areas are classified by operation of law as marginal, moderate, serious, severe, or extreme areas based on the design values for the area *under the existing ozone NAAQS.*"[100] This explanation of the House's version of the bill confirms the conclusion that Subpart 2 applies only to the "existing ozone NAAQS" – that is, the ozone NAAQS that existed in 1990, when the Amendments were passed, rather than to any revised ozone standard.

At the very least, the cascade of language in Subpart 2 indicating that Subpart 2 applies only to the prior one-hour ozone standard, combined with the absence of the single number (4) in section 181(a)(1), creates an ambiguity that EPA is entitled to resolve as long as it does so reasonably. *See Chevron*, 467 U.S. at 866. As set forth above, EPA's interpretation of Subpart 2 to apply only to the ozone standard existing in 1990 creates a sensible regulatory regime in which EPA's obligation to revise the NAAQS, and to designate areas according to their attainment status under the revised NAAQS, is not rendered empty by a senseless limit on EPA's authority to implement and enforce the revised standard.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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[100]H.R. Rep. No. 101-490, at 229 (1990) (emphasis added).

Respectfully submitted.

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